OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Michael J. Aguirre

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE COMMITTEE ON RULES, FINANCE AND INTERGOVERNMENTAL RELATIONS

OVERVIEW OF LAW CONCERNING SUBCONTRACTOR OUTREACH PROGRAMS AND DATA COLLECTION

INTRODUCTION

During the non-agenda public comment portion of the May 15, 2007 City Council meeting, members of the community raised concerns regarding the status the City's Equal Opportunity in Contracting Program (EOCP). Of specific concern was the City's failure to collect and report data as required by the City's Subcontracting Outreach Program (SCOPe) for the past two fiscal years. In response, on May 21, 2007, Councilmember Tony Young submitted a memorandum to Mayor Jerry Sanders, requesting a report addressing the concerns raised at the May 15 City Council meeting. Councilmember Young specifically requested that the report include:

(1) A description of programs and strategies currently being used to promote equal opportunity in contracting, including program changes being considered and the reasons for the proposed changes;

(2) A description of the EOCP's process for monitoring compliance by prime contractors with equal opportunity related requirements;

(3) Data showing the participation of minority and women-owned business entities during the last two fiscal years; and

(4) A discussion of the impact of the Business Process Reengineering effort on ECOP functions and operations.

Councilmember Young requested that the report be presented at the appropriate committee meeting regarding the EOCP. On August 1, 2007, the Rules Committee will hear a presentation by the City's Purchasing and Contracting Department concerning the status of the

EOCP, data collection, and reporting efforts. In conjunction with the presentation by the Purchasing and Contracting Department, this Report is intended to provide the Rules Committee with an overview of the current state of the law governing subcontracting outreach programs and data collection.

DISCUSSION

I. Overview of City Law Regarding Equal Employment Opportunity in Contracting.

San Diego Municipal Code (SDMC) sections 22.2701, *et seq.*, establish the framework for the City's current Equal Employment Opportunity in contracting program. The overall objective of the program is: "to ensure that contractors doing business with or receiving funds from the City will not engage in unlawful discriminatory employment practices prohibited by State and Federal law." SDMC section 22.2701. A key component of the program is that City contracts[1] include a non-discrimination clause, which requires that prime contractors ensure compliance by their subcontractors. SDCMC section 22.2704.

In addition, contractors are required to submit certain documentation to the City, including a Work Force Report showing the gender and ethnic breakdown of the contractor's work force by occupational category. In some cases, when a Work Force Report raises equal opportunity concerns, the City may require the contractor to submit an Equal Opportunity Plan which must be approved prior to final contract award. SDMC section 22.2705(b). The Municipal Code expressly provides that any Equal Opportunity Plan approved by the City "shall not include quotas, goals, or timetables for increasing women and minority employment and will not require terminating or laying off existing employees." SDMC section 22.2705(c).

Finally, the City is required to conduct periodic reviews of approved Equal Employment Opportunity Plans to ensure compliance, and may recommend termination of a contract or debarment for failure to comply with a Plan and/or for unlawful discrimination. SDMC section 22.2707.

In addition to the Equal Employment Opportunity in contracting program established by the Municipal Code, Council Policy 300-10 sets forth the City's general Equal Opportunity policy. Council Policy 300-10 provides that the City Council "is committed to an Equal Opportunity Program pursuant to applicable State and Federal laws and guidelines…" and that

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[1] Certain contracts are generally exempt from the provisions of the Equal Employment Opportunity program, including: (1) contracts with contractors or subcontractors who have done less than $10,000 worth of business with City in the preceding 12 months annually or have less than 15 employees, (2) contracts with other public entities, (3) contracts with nonprofit organizations, and (4) some emergency contracts, provided a written or partial waiver is granted by the City. SDMC section 22.2703.

"the City has extended this commitment even further to have as the City's goal that the representation of women and minorities in the City's work force achieve parity with the ethnic and sex composition of the population of the City of San Diego." CP 300-10 (1).

Council Policy 300-10 further provides that City staff provide semi-annual reports "detailing [Equal Opportunity] goals, progress, and strategies" to the City Council for review and approval by the Rules Committee. The Policy also establishes an Equal Opportunity Commission to monitor the City's Equal Opportunity programs and progress. CP 300-10 (8).

II. The 1995 Disparity Study and SCOPe Program.

In 1995, the City of San Diego conducted a Disparity Study to research how socially and economically disadvantaged groups were being treated in the public contracting industry. The City's Disparity Study revealed that the City was engaged in at least "passive" discrimination against socially or economically disadvantaged groups in the award of public contracts. As a result, the City adopted the Subcontracting Outreach Program (hereinafter SCOPe Program) to remedy the discrimination and to encourage full and fair competition. The SCOPe Program sets advisory participation levels for disadvantaged groups and asks bidders to include data on minority participation.[2] The advisory levels are not mandatory and do not constitute a basis for disqualification from the contract if the bidder cannot meet the recommendations.

The SCOPe Program awards bidders points for documentation of various race/gender-neutral outreach efforts, with a maximum of one hundred points. The documentation verifies that the "bidder made subcontracting opportunities available to a broad base of qualified subcontractors, negotiated in good faith with interested subcontractors, and did not reject any bid for unlawful discriminatory reasons." Subcontracting Outreach Program Summary, § V, p. 7. Any bidder who fails to achieve at least eighty out of one hundred points is disqualified from receipt of the public contract, but achieving or failing to achieve the advisory levels of minority participation does not result in the addition or loss of any points.

The SCOPe program also asks bidders to include data on the percentage of socially and economically disadvantaged firms subcontracted for the work. Recently, numerous discussions among interested parties, and at least one media report, have raised the issue of what kinds of data the City may collect to monitor the progress of its anti-discrimination efforts, and the legal implications of failure to collect such data.

III. Subcontractor Outreach and Data Collection Under State and Federal Law.

This Report is intended to provide an overview of the legal implications of the key

[2] This requirement applies to City-funded construction contracts of $100,000 or more.

components of SCOPe program, namely: (1) subcontractor outreach requirements, and (2) data collection. The critical legal questions are:

QUESTIONS PRESENTED

1. Whether and to what extent subcontracting outreach programs are permissible under Proposition 209 and federal Equal Protection principles.

2. Whether and to what extent data collection programs are permissible under Proposition 209 and federal Equal Protection principles.

3. Whether the City has an *affirmative* obligation to mandate broad-based subcontractor outreach and data collection to ensure Equal Employment Opportunities in contracting.

BRIEF ANSWERS

1. Subcontracting outreach programs are permissible so long they broadly target participation by all subcontractors and are race/gender neutral in their focus.

2. Data collection programs are permissible so long as the data is not used to implement discriminatory or preferential treatment programs.

3. The City has an affirmative obligation to remedy intentional past discrimination; broad-based subcontractor and data collection efforts can assist the City in determining appropriate remedial measures.

A. Historical Background: Proposition 209 and Subsequent Case Law.

In 1996, the People of California voted by a narrow margin to amend the State Constitution to prohibit public entities from discriminating against or awarding preferential treatment in public contracting to a person or firm based on race[3] or gender classifications. The language that accompanied the initiative on the ballot made it clear that the purpose of the amendment was to prohibit affirmative action programs based on the enumerated criteria. Proposition 209 states: "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a) (hereinafter Proposition 209).

Proposition 209 essentially functions as a ban on any race or gender-based discrimination or affirmative action programs unless an exception applies. The exceptions are enumerated in the California Constitution and include: (1) programs requiring bona fide qualifications based on sex

[3] Throughout this memorandum, the word "race" will be used to refer to race, color, ethnicity, and/or national origin.

that are reasonably necessary to the normal operation of the project, (2) affirmative action

programs that have been ordered by a court, and (3) programs that are necessary to obtain or maintain federal funding. *Id.* at § 31(c – d).

Immediately after its passage, the constitutionality of Proposition 209 was called into question. On November 6, 1996, the day after Proposition 209 was approved by the voters, opponents brought suit in federal court, claiming that Proposition 209 violated federal Equal Protection principles and was void under the Supremacy clause. The district court agreed and granted a preliminary injunction prohibiting state officials from enforcing the new law. In *Coalition for Economic Equity v. Wilson,* 122 F. 2d 692, 697 (9th Cir. 1997) the Ninth Circuit overturned that district's court's decision, finding that Proposition 209 was not in conflict with federal Equal Protection laws. *Id.* at 710. The United States Supreme Court denied review the Ninth Circuit's decision in *Coalition* and it remains good law.

Proposition 209 has called into question some of California's affirmative action programs in the field of public contracting. In order to encourage competitive prices and strengthen the State's economy, the California Legislature has declared that women and minority participation should be encouraged in public contracting. Cal. Pub. Cont. Code § 10115(a)(1) (2007). However, the portion of the Public Contracts Code that previously allowed participation goals and other preferences for these groups has been repealed as an unconstitutional violation of equal protection of the laws. Cal. Pub. Cont. Code § 10115.5 (repealed 1998); *see also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (1997).

Outreach programs for the economically disadvantaged are still generally permitted, but they must be race/gender-neutral in their focus. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 565 (2000). As a result of Proposition 209, these outreach and recruitment programs have been highly litigated in California over the past decade, as will be further discussed below.

B. Subcontractor Outreach Programs.

In a previous San Diego City Attorney Opinion, the City Attorney determined that Proposition 209 does not prevent the City from investigating its contractors to ensure that they do not engage in unlawful discrimination, from remedying individual cases of actual discrimination, or from implementing programs that maximize opportunities for all qualified contractors. Op. San Diego City Att'y No. 97-2 (1997) (Op. 97-2). The City Attorney determined that outreach programs are constitutional, so long as they did not target specific gender, racial, or ethnic groups to the exclusion of others. The opinion summarizes the types of preferential treatment no longer permitted under Proposition 209:

> By banning preferential treatment, Proposition 209 bans affirmative action programs implemented by government agencies that use percentages, quotas, or set-asides to meet a goal of including or benefiting minorities

> and/or women. Where those programs seek to confer a benefit on individuals or groups identified by gender, race, color, or ethnicity, they are no longer legal. Proposition 209 bans government "programs that would prefer contractors of a certain race or gender in the evaluation of bids for public contracts, programs that would prefer prospective employees of a certain race or gender for public employment, and programs that would prefer prospective students of a certain race or gender for public education or financial aid."… Likewise, outreach programs that focus on reaching particular racial or ethnic groups within the community, and do not provide the same outreach to others, express a preference for those groups, and are no longer permitted.… Op. 97-2 at 5, *citing Coalition, supra,* 110 F.3d at 1438.

Later in the Opinion, the City Attorney concludes that the broad-based outreach programs pass constitutional muster, and recommends that the City expand its outreach efforts accordingly:

> Proposition 209 extends beyond actual contracting and employment practices, to preclude outreach efforts that are limited by race and/or gender. *However, nothing precludes the City from imposing greater race- and gender-neutral outreach requirements on contractors generally*. The City could continue the current requirements for good faith outreach efforts, but expand the requirements beyond MBEs and WBEs to include all interested bidders. Such an outreach requirement would ensure greater access to parties who may be interested in competing for work on City contracts. As previously noted, the idea is to maximize the opportunities available to all bidders. Op. 97-2 at 22. (Emphasis added).

The 1997 Opinion also makes clear that outreach programs targeting particular categories not encompassed by Proposition 209 (i.e., race/gender neutral categories) continue to be legally sound:

> Proposition 209 discusses five categories of discrimination or preferential treatment: race, sex, color, ethnicity, or national origin…. The only preferences that are banned by Proposition 209 are those that use any of the five categories listed. There are other categories and bases for distinction, however, that are not included in Proposition 209, and not affected by its provisions. Thus, programs that prefer poor applicants, or people who did fairly well on tests despite having gone to a bad school, or children who were raised in single-parent households, or groups defined using any other neutral classification, are untouched by [Proposition 209]. Preferences for applicants who speak a foreign language that will be

> useful in the job, or who have ties to the geographical area that they're supposed to serve, would likewise remain allowed. This is even true if
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> these neutral programs end up disproportionately benefitting people of a particular race or ethnicity or sex….
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> Proposition 209 does not ban government action directed toward assisting economically disadvantaged, small, or start-up businesses. Cities and counties may identify such segments of the population or individuals and take action to assist those groups or persons, as long as they articulate justifiable reasons for doing so… The distinction between race, sex, color,
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> ethnicity and national origin on the one hand, and the economically disadvantaged on the other, goes to the heart of Proposition 209. The argument included in the ballot pamphlet by the authors of Proposition 209 states:
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>> THE BETTER CHOICE: HELP ONLY THOSE WHO NEED HELP! We are individuals! Not every white person is advantaged. And not every "minority" is disadvantaged. Real "affirmative action" originally meant no discrimination and sought to provide opportunity. That's why Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue….Any program already in existence that bases its criteria on economic need without considering race or sex should not be affected by Proposition 209.
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> The list of banned preferences in Proposition 209 does not include persons who are disabled, veterans, or disabled veterans. Presumably, public agencies may continue to use these categories as bases for benefit programs, to the extent permitted by current federal and state law…. Op. 97-2 at 8.

In addition, the 1997 Opinion discussed court decisions regarding particular outreach programs, including the comprehensive Equal Opportunity program implemented by the City of Los Angeles. The Los Angeles program, which advised contractors of *anticipated* levels of MBE/WBE participation and strongly encouraged outreach - but imposed no extra credit or penalty for actual participation rates- was upheld as constitutionally sound in *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal.4th 161 (1994) (*Domar I*) *and Domar Electric, Inc. v. City of Los Angeles*, 41 Cal.App.4th 810 (1995) (*Domar II*). Op. 97-2 at 19.

The 1997 Opinion also noted developing litigation with respect to the City of San Jose's equal opportunity contracting program, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, which was pending in Santa Clara Superior Court at the time. The City Attorney advised the City

Council that it would monitor the case, but expected the litigation continue for an extended period of time. Op. 97-2.

Hi-Voltage ultimately reached the California Supreme Court, which held San Jose's program to be unconstitutional. *Hi-Voltage, supra,* 24 Cal.4th 537, 562-64 (2000). San Jose's program had set a "participation goal" based on the availability of MBEs and WBEs to perform the contracted-for work. Prime contractors were required to either demonstrate that they had achieved the participation goal or had engaged in specified outreach efforts to MBEs and WBEs. Failure to do so would result in a bid being deemed non-responsive. *Id.* at 542. The *Hi-Voltage* court found that the program ran afoul of Proposition 209 because the mandatory participation or outreach components constituted preferential treatment on the basis of race and gender. *Id.* at 562-64. Significantly, the court acknowledged that although San Jose's race/gender-conscious outreach program was unconstitutional, "outreach may assume many forms, not all of which would be unlawful." *Id.* at 565.

More recently, the First District Court of Appeal addressed whether race/gender-conscious outreach programs would be permissible under *federal* Equal Protection principles. *Coral Construction, Inc. v. City and County of San Francisco*, 149 Cal.App.4th 1218 (2002). *Coral* involved a challenge against San Francisco's Equal Opportunity in contracting program, which included bid discounts for MBEs and WBEs and required prime contractors to either reach expected participation levels or document good faith efforts to do. *Id.* at 1228. Unlike the situation in *Hi-Voltage*, the City of San Francisco argued that its program was constitutionally required in order to remedy intentional past discrimination in contracting. *Id.* at 1249. [4]

Coral held that, although Proposition 209 generally prohibited preferential treatment on the basis of race or gender, federal Equal Protection and Supremacy clause principles permit –and indeed may require- race/gender-conscious programs that are narrowly tailored to remedy past discrimination. As the court stated:

> If a city or other political subdivision were found to have engaged in intentional discrimination such that some type of race-based remedial program was *necessary* under the federal Constitution, the supremacy clause as well as [Proposition 209] dictate that federal law prevails. *Id.* at 150.

Put another way, where a public entity has intentionally discriminated, "use of a race-conscious or race-specific remedy necessary follows as the only, or at least the most likely means of rectifying the resulting injury…" *Id.* at 1249, *citing Hi-Voltage, supra,* 24 Cal.4th at 568.

In sum, outreach programs that are race/gender neutral will not run afoul of Proposition 209 or federal Equal Protection principles. In addition, *Hi-Voltage* and *Coral* suggest that even

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[4] The *Coral* court noted in Footnote 17 of the opinion, "Significantly, unlike the current situation, the City of San Jose *conceded* that its program was not constitutionally required… Moreover, its disparity study was not part of the record, and thus the court had no way to measure the fit between the remedy and the goal of eliminating the disparity." *Coral* at 1249. (Emphasis in original.)

race/gender conscious outreach programs are permissible –and sometimes required - if narrowly tailored to address intentional past discrimination.

Because SCOPe is race/gender neutral in its focus, it is legally permissible under both state and federal standards. As discussed above, SCOPe requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors. In addition, SCOPe sets advisory levels for categories which are not prohibited under Proposition 209, such as socially or economically disadvantaged business enterprises (DBEs), disabled veteran enterprises (DVEs), and other business enterprises (OBEs).

C. Subcontractor Data Collection.

In its 1997 Opinion, the City Attorney acknowledged that, notwithstanding Proposition 209's prohibition against discrimination or preferential treatment, the City could collect data regarding the gender or racial breakdown of contractors and subcontractors. As stated in the Opinion, although Proposition 209 generally prohibited race/gender-conscious programs:

> [T]here are still situations where the race/gender of a particular contractor is relevant; for example, in the award of contracts involving federal grants, and investigating suspected race- or gender-based discrimination against employees or subcontractors… Op. 97-2 at 15.

The City Attorney's conclusions regarding data collection were affirmed in the Third District Court of Appeal's decision in *Connerly v. State Personnel Board*, where the court held that there is a recognized interest in being able to select contractors for public projects from a broad pool of applicants. 92 Cal.App.4th 16, 46 (2001). The court acknowledged that discrimination is still a relevant concern, which a public agency may address with neutral outreach and data collection efforts: "Accurate and up-to-date information is the sine qua non of intelligent, appropriate legislative and administrative action." *Id*. ***As long as the data is not used to grant preferential treatment or discriminate against a person based on race or gender, the collection does not violate Proposition 209.*** *Id.*

Likewise, the Equal Protection Clause is not implicated if the data is collected in a neutral manner and is not used for discriminatory purposes. The *Connerly* court found that race-based collection measures could be justified under strict scrutiny analyses based on the City's compelling interest in reporting accurate and up-to-date information in public contracting.[5] *Id*. at 31. The statistical information can be used to pinpoint specific acts of discrimination, find areas where outreach may be necessary or lacking, or notify the Legislature that discrimination is not occurring at all. *Id*. at 38.[6]

[5] Since race-based collection measures are upheld under strict scrutiny, it is likely that gender-based collection measures could also withstand Equal Protection analysis, which requires a lower level of scrutiny than race-based classifications.

Proposition 209 requires equality in the award of public contracts. It prohibits preferential treatment and discrimination of any kind with very limited exceptions. In order to enforce any requirement that contractors provide necessary data, a public agency may refuse to award contracts to firms that refuse to provide such data. As long as such disqualification is based on the failure to provide data, and is not to any degree related to achievement of certain participation levels, the disqualification is permissible.

The City's SCOPe program requires bidders to provide data regarding the participation levels of DBE, DVBE, and OBE subcontractors. It does not specifically require information regarding the gender or racial breakdown of contractors or subcontractors. Even if the reporting requirements of the SCOPe program could be construed as race/gender-conscious, such data collection efforts are constitutional so long as they are not used in furtherance of discriminatory or preferential treatment programs.

D. The City's Affirmative Obligations With Respect to Equal Opportunity in Contracting.

In addition to submitting documentation regarding outreach efforts and participation levels in bidding materials, SCOPe requires contractors to submit a "Final Summary Report" within 15 days after final inspection of the contract work. The Final Summary Report must show *actual subcontractor activity* during the project; failure to submit the Report may result in assessment of liquidated damages or withholding of retention. Subcontracting Outreach Program Summary, § IX, p. 9.

Recently, community members have raised concerns regarding the lack of enforcement of the SCOPe reporting requirements. In addition, questions have arisen regarding whether the City has an obligation to update the findings in its Disparity Study, which is now 12 years old. While the City's Equal Employment Opportunity programs and SCOPe are certainly permissible, the legal issue that arises is whether the City has an affirmative duty to *do more than it's already doing* to ensure equal access to City contracting opportunities.

The *Hi-Voltage* and *Coral* opinions suggest that when intentional discrimination has taken place in the past, a public entity has a constitutional *duty* to craft narrowly tailored programs to remedy the effects of that discrimination. As the court states in *Coral*:

> Indeed, state actors have a 'constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.' [Citations omitted.] State a little differently, 'the State has the power to eradicate racial discrimination and its effects

> in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself.' *Coral at 1248, citing City of Richmond v. J.A. Crosan Company*, 488 U.S. 469, 518 (1989).

Without up-to-date data regarding the effectiveness of City programs in meeting the City's stated goal "that the representation of women and minorities in the City's work force achieve parity with the ethnic and sex composition of the population of the City of San Diego" (CP 300-10), the City cannot continue to meet its own goal. In addition, the abandonment of meaningful outreach programs and data collection efforts may put the City puts at risk for failing to remedy past discrimination as constitutionally required.

CONCLUSION

The City's broad-based outreach programs and data collection efforts are consistent with state and federal law because neither constitutes discrimination or preferential treatment. The discontinuation of such programs and efforts will make it difficult or impossible for the City to measure its progress in the area of Equal Employment Opportunity and craft remedial programs as necessary.

Respectfully submitted,

MICHAEL J. AGUIRRE
City Attorney

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